

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA : 12-CR-68 (DLI)  
-against- : U.S. Courthouse  
: Brooklyn, New York

JOANNA FAN  
ZIMING SHEN

Defendants : September 4, 2012  
- - - - - X 3:15 p.m.

## BEFORE:

HONORABLE DORA L. IRIZARRY  
United States District Judge

## APPEARANCES:

For the Government: LORETTA E. LYNCH  
United States Attorney  
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Brooklyn, New York 11201  
BY: DANIEL SPECTOR  
Assistant U.S. Attorney

For the Defendant: MARTIN B. ADELMAN  
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New York, New York 10007

Curcio Counsel: JOYCE C. LONDON  
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New York, New York 10007

U.S.A. v. FAN and SHEN

2

1 For the Defendant: BARRY W. AGULNICK  
2 Ziming Shen 8 Bond Street  
3 Suite 303  
4 Great Neck, New York

5 Curcio Counsel: LUCAS E. ANDINO  
6 Ziming Shen 445 Park Avenue  
7 9th Floor  
8 New York, New York 10022

9 For the Defendants: MORVILLO, ABRAMOWITZ, GRAND, IASON,  
10 Fan and Shen ANELLO & BOHRER, P.C.  
11 565 Fifth Avenue  
12 New York, New York 10017  
13 BY: ROBERT M. RADICK  
14 DAVID J. STANKIEWICZ

15 Court Reporter: RONALD E. TOLKIN, RPR, RMR, CRR  
16 Official Court Reporter  
17 225 Cadman Plaza East  
18 Brooklyn, New York 11201  
19 718-613-2647

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20 THE COURT: I am not going to keep you any longer  
21 than we have to. This is United States versus Fan and Shen.  
22 Docket number 12-CR-68. This is on to resolve a Curcio issue.  
23 Can we have the parties appearance, please, for the  
24 record.

25 MR. SPECTOR: Good afternoon, Your Honor.

U.S.A. v. FAN and SHEN

3

1 Daniel Spector, for the government.

2 THE COURT: If I can still have retained counsel  
3 first on behalf of Ms. Fan?

4 MR. ADELMAN: Martin Adelman, A-D-E-L-M-A-N.

5 Good afternoon, Your Honor.

6 THE COURT: On behalf of Mr. Shen?

7 MR. AGULNICK: Barry Agulnick, A-G-U-L-N-I-C-K.

8 Good afternoon, Your Honor.

9 THE COURT: Good afternoon.

10 Proposed new counsel, please.

11 MR. RADICK: Good afternoon, Your Honor.

12 Robert Radick of Morvillo Abramowitz. And with me  
13 is David Stankiewicz.

14 MR. STANKIEWICZ: David Stankiewicz,  
15 S-T-A-N-K-I-E-W-I-C-Z.

16 THE COURT: We also have Curcio counsel who are here  
17 for Ms. Fan.

18 MS. LONDON: Good afternoon, Your Honor.

19 Joyce London, Curcio counsel.

20 THE COURT: Good afternoon.

21 Curcio counsel for Mr. Shen?

22 MR. ANDINO: Lucas E. Andino, A-N-D-I-N-O.

23 Good afternoon, Your Honor.

24 THE COURT: Good afternoon to Ms. Fan and Mr. Shen.

25 Again, my sincerest apologies for keeping you all

1 waiting.

2 Just so that we cue up the record to where we were  
3 the last time that we met, we had discussed some concerns that  
4 were raised both by the government and the Court with respect  
5 to Ms. Fan and Mr. Shen's desire to be represented by the same  
6 counsel. That would be Mr. Radick and the firm that he just  
7 mentioned, to replace previous counsel, which are Mr. Adelman  
8 and Mr. Agulnick.

9 The last time that we were here, the Court had  
10 appointed Curcio counsel for Ms. Fan and Mr. Shen. The Court  
11 had explained to both Ms. Fan and Mr. Shen the consequences of  
12 being represented by the same attorney at a very critical  
13 stage, which is the sentencing stage. And there may be, of  
14 course, different interests that each defendant may have and  
15 the potential conflict that could be presented by being  
16 represented by the same attorney.

17 I think at the end of the hearing we were all in  
18 agreement that it was a conflict that could be waivable. But  
19 I thought it prudent to give the defendants each an  
20 opportunity to consult with independent counsel about their  
21 right to be represented by conflict free counsel, if that  
22 conflict is a potential one and not necessarily an actual one.

23 Ms. London, did you have time to consult with your  
24 client in that regard?

25 MS. LONDON: Yes, I have, Your Honor.

1                   Just for the record, I received copies of the plea  
2 transcript and the plea agreements. We have reviewed those  
3 and discussed those with her.

4                   THE COURT: Mr. Andino, you also?

5                   MR. ANDINO: Yes, Your Honor. I received from  
6 Mr. Radick copies of the plea agreement and the transcript and  
7 the complaint and other documents in the docket in the case,  
8 and have discussed those with him.

9                   THE COURT: Ms. Fan, do you understand everything  
10 that we discussed the last time that we were here?

11                   DEFENDANT FAN: Yes, I do.

12                   THE COURT: Having had the opportunity to consult  
13 with Ms. London on this matter, how do you wish to proceed?

14                   DEFENDANT FAN: I understand that there will be a  
15 potential conflict. But I will waive my rights with  
16 Mr. Radick for any conflict I have in the future. Also, I  
17 understand that the lawyers will be divided but that is fine.

18                   THE COURT: Okay. So you understand that there  
19 could be this possible conflict. That there is a possibility  
20 that there could be some defenses that you might be able to  
21 raise on your behalf that might conflict with defenses for  
22 Mr. Shen. But you are willing to waive that potential  
23 conflict, is that correct?

24                   DEFENDANT FAN: Correct.

25                   THE COURT: Has anyone forced you or threatened you

1 in any way to make that decision?

2 DEFENDANT FAN: Not at all.

3 THE COURT: Mr. Shen, what is your desire?

4 DEFENDANT SHEN: Yes, I have same desire as my wife,  
5 to have Mr. Radick to represent the both of us. I understand  
6 that I have a potential conflict but I wish to retain  
7 Mr. Radick anyway.

8 THE COURT: So the same as I asked Ms. Fan, you are  
9 willing -- as I understood what you're telling me is that you  
10 are willing to waive any potential conflict that there might  
11 be based on potential defenses that Mr. Radick could present  
12 on your behalf at the time of sentencing. You're willing to  
13 waive that potential conflict, is that correct?

14 DEFENDANT SHEN: Yes, Your Honor.

15 THE COURT: Did anyone force you or threaten you in  
16 any way to make that decision?

17 DEFENDANT SHEN: No.

18 THE COURT: Mr. Shen, do you believe that you  
19 completely understand what's at issue here?

20 DEFENDANT SHEN: Yes, Your Honor.

21 THE COURT: Do you feel that you have had sufficient  
22 time to discuss this independently with Mr. Andino?

23 DEFENDANT SHEN: Yes. We had a lot of conversation.

24 THE COURT: Ms. Fan, I didn't ask you that. Do you  
25 feel that you had sufficient time to discuss this potential

U.S.A. v. FAN and SHEN

7

1 conflict with Ms. London?

2 DEFENDANT FAN: Yes.

3 THE COURT: I'm relieved with the thanks of the  
4 Court Mr. Agulnick and Mr. Adelman. Again, my sincerest  
5 apologies for today's snafu. I do appreciate that you waited  
6 around until we could rectify this. So you're relieved from  
7 this case with the thanks of the Court, and I'm sure with the  
8 thanks of your client.

9 I want to thank Curcio counsel, Ms. London and  
10 Mr. Andino. You're both also relieved. Again, also with the  
11 thanks of the Court. Thank you.

12 So what I would like to do at this point -- and I  
13 don't want to keep counsel any further. So you're excused if  
14 you have other places to be. I'm sure you do.

15 MR. ANDINO: Thank you, Your Honor.

16 THE COURT: Thank you again. Thank you very much.  
17 I think we're in a better position.

18 Mr. Shen, why don't you move up so you're a little  
19 closer. You look like you're far away there.

20 We can speak, I think, a little more intelligently,  
21 if you will, about scheduling as far as sentencing is  
22 concerned.

23 The presentence report had been held in abeyance  
24 pending the outcome of some sort of a grounding, if you will,  
25 as to, or a determination as to what the loss amounts were

1 going to be that were involved here, that were going to guide  
2 the -- that was going to form the basis for the loss  
3 guidelines calculation, if I recall correctly.

4 So where is that at this point?

5 MR. RADICK: If I may, Your Honor.

6 When we were here last, we indicated that we had  
7 been reviewing the documents. There are eighty or more boxes  
8 of documents that were in Bethpage that the government seized  
9 upon executing a warrant. And we were doing that right up to  
10 the very last day that the Court had set, and were copying and  
11 sent a number of documents which have since been given to a  
12 forensic accountant who has been retained to help us in  
13 analyzing those documents and assessing the government's loss  
14 estimate.

15 To give the Court a sense of generally what the  
16 forensic accountant is doing, the loss estimate in this case  
17 is based upon the analysis of bank records for a roughly  
18 five-year period, and assesses how much was transferred from  
19 Red Apple to another entity and then, in turn, how much of  
20 that was spent on food.

21 We think that there may be, actually, a significant  
22 amount more to the story and to the loss analysis that  
23 includes money that was spent on food that didn't go through  
24 those accounts. And as reflected in voluminous number of  
25 receipts for food and other food expenditures that are

1 allowable under the CACFP.

2 So what the forensic accountant is doing now is  
3 going through those records one-by-one and charting them out  
4 so that we have a sense as to what those numbers are. Because  
5 we think those may actually provide an offset, depending on  
6 what we find, to the government's loss estimate.

7 Now, I've spoken, as of yesterday, with the forensic  
8 accountant. Given the volumes of the materials that we're  
9 talking about, which are extensive, and the need to do a  
10 thorough job so everyone can rely on it, us, the government  
11 and the Court, he's indicated to me it's a process that he  
12 anticipates will take until mid October. To go through all of  
13 those receipts, chart out the numbers and then be able to talk  
14 with us about what they reflect.

15 So that's the general starting point for our time  
16 frame. We would request that we be allowed, given the  
17 critical nature of this stage, the sentencing stage, and the  
18 amount of documents, to allow that process to run its course  
19 so that we can all be relying on accurate loss information.  
20 And we can then discuss with the government any issues that we  
21 may have and see if we can reach agreement.

22 THE COURT: One question that pops up in my mind as  
23 you're describing the types of accounts to which monies may  
24 have gone or may have been disbursed into, which would include  
25 food accounts.

1           Now, obviously there are food accounts and then  
2 there are food accounts. There are food accounts for which  
3 the money was designated that they should go. But I mean, if  
4 it's money that's going for food that's not going for what the  
5 program monies were designated for, which was to provide food  
6 for school children, then that is a different story.

7           I don't know how -- obviously I haven't seen these  
8 documents. So I don't know how notations are made on them,  
9 how they can be distinguished in terms of knowing how to  
10 separate, just very simply, money that goes for food just  
11 generally and money that goes for food as it was intended  
12 pursuant to the program.

13           MR. RADICK: Right. That would be something that we  
14 would look at the documents for. Many of them, in fact, say  
15 that they are for food purchases for Red Apple instead of  
16 schools for which the government food program money was  
17 provided. And so if those food purchases are for, in fact,  
18 the Red Apple students then that would be a permissible food  
19 expenditure, in our view.

20           Plus, as I mentioned, there are other allowable  
21 expenses under the CAFCP, not just for food, and other  
22 expenditures that the rules permit. So we would be looking at  
23 these records and determining if -- you're correct to point  
24 out, if the money was spent on food and food related expenses  
25 for the Red Apple schools.

1           With respect to these specific accounts, I would  
2 just note, and this may address one point the Court made,  
3 which is that the CACFP did not require Red Apple to maintain  
4 a segregated account until later in the time period that is  
5 included in the government's -- roughly a little less than  
6 five years, but a five-year period.

7           The segregated account was something that was  
8 included in an audit of 2007 that there be a segregated  
9 account. So all the money need not have flowed through that  
10 account in order for it to be considered properly spent on the  
11 purpose for which it was intended.

12           THE COURT: You wish to speak on this?

13           MR. SPECTOR: A couple of thoughts, just briefly.

14           As to the last point, I think that that's not quite  
15 accurate. My understanding is that the first audit, the  
16 auditor told the defendants that they should have been using a  
17 segregated account. And after that time, the defendant  
18 started doing it. But I don't think there was ever a  
19 situation where before certain dates it was okay for them to  
20 not use a segregated account. I'm not sure how much of a  
21 difference that's going to make in a practical matter.

22           Just another point worth noting. And again, this is  
23 something we can deal with, if necessary, at sentencing. They  
24 said that there are invoices. And it was made clear in the  
25 information that a lot of the invoices were actually fake.

1           So it's difficult, from our perspective, to really  
2 respond because obviously we don't have the forensic  
3 accountant's report. And I certainly don't fault Mr. Radick  
4 at all, he's new to the case. But from our perspective, we  
5 were hearing for months from prior counsel that there was this  
6 forensic accountant analysis that was forthcoming. And we  
7 have never seen anything.

8           So, you know, we have a little concern that the  
9 defendants may be attempting to manufacture complexity here as  
10 a way of kind of obfuscating their full culpability.

11           Again, it's hard to respond in a vacuum. So, you  
12 know, we certainly understand Mr. Radick's position of wanting  
13 to take time to do what he feels he needs to do. But at the  
14 end of the day, I'm not sure, from the government's  
15 perspective, that the numbers are going to be altered.

16           MR. RADICK: Your Honor, briefly.

17           First of all, this is an analysis that was not  
18 initiated until recently. And I can't really speak to why  
19 that is except I'm here now and it was initiated recently.

20           I'm not sure that I understand the comment that  
21 certain of the documents were fake. I think that perhaps what  
22 Mr. Spector is saying is that certain of the statements that  
23 were submitted to the CACFP for specific meal counts were  
24 inflated. But I don't know that there's any reference -- and  
25 I'm sure he will correct me if I'm wrong -- to actual forged

1 documents in any pleadings or in the complaint or in the  
2 information, or anywhere in the case. There's been no  
3 allegation that any invoices themselves are not accurate.

4 I've also offered, I've mentioned them, to -- we  
5 have these documents, to Mr. Spector. And I'm happy to  
6 provide him with a chance to see them. When you see them,  
7 you'll realize it's incredibly difficult to fabricate them.  
8 Incredibly difficult if not actually impossible.

9 In any event, I just wanted to mention those things.  
10 And also, with respect to the segregated account, that was in  
11 an audit, as I said, from 2007. That was first brought to  
12 their attention, that they needed to have a segregated  
13 account. That was not the first audit. I believe it was the  
14 second audit that was done.

15 In any event, the lack of a segregated account is  
16 not in any way a crime. The lack of a segregated account may  
17 be a violation of the rules. But that's not, in and of  
18 itself, any sign or proof or any part of the activity that's  
19 led us to be in this precise spot.

20 THE COURT: Well, I'm in the same position, probably  
21 more so, than the government because my vacuum is a lot larger  
22 than the government's vacuum since I really haven't seen any  
23 of these records at all.

24 But I think in all fairness, given the fact that Mr.  
25 Radick is fairly new entered into the case, He has at least

1 started to move the case forward, expeditiously it appears.  
2 It doesn't make sense to rush through this only to find that  
3 errors have been made and make things more complicated than  
4 they need to be.

5 Especially when you're talking about fraud cases  
6 where really the loss drives the guidelines and also drives  
7 the restitution, it's important to get as accurate a picture  
8 as we can.

9 Then, as with any other case, if there really is a  
10 bigger disparity between what the government says should be  
11 the loss amount or defense says, then we'll have a hearing if  
12 we have to have a hearing. We will do that.

13 But it probably makes sense to have the defense come  
14 up with however it's going to be presented, a chart or a  
15 report or however it's going to be presented, for the defense  
16 and the government to consult with respect to that first and  
17 then make submissions to probation.

18 Does that sound fair?

19 MR. SPECTOR: That's fine from the government's  
20 perspective.

21 THE COURT: Okay. You said around mid October,  
22 Mr. Radick. Would around October 17th, that's right smack in  
23 the middle of the calendar.

24 MR. RADICK: I understand that this analysis that  
25 he's doing will not be completed until mid October. And then,

1 of course, we would want to sit down and go through it,  
2 review. It wouldn't take very long, I would think, but we'd  
3 want to review it. Then I suggest we would sit down with  
4 Mr. Spector, with the forensic accountant, depending on what  
5 the circumstances may be, and explain any issues we have or  
6 any arguments we have, see if we can work them out.

7                   What I would propose is that we do our analysis  
8 through the 15th or the 17th, somewhere in there. I don't  
9 have a calendar in front of me. Within a week or two, or ten  
10 days, somewhere in the middle, we would try to meet with  
11 Mr. Spector. And we would then report back to the Court as to  
12 where we are. Or to probation, as the case may be.

13                  THE COURT: Right about the middle will be about  
14 October 17th, which is a Wednesday. So if the defense has a  
15 report ready, say, by the 26th?

16                  MR. RADICK: To provide to the government?

17                  THE COURT: To provide to the government. Or by the  
18 31st. That would be about ten days. Do you want to do it by  
19 the 31st?

20                  MR. RADICK: That would be great. Thank you, Your  
21 Honor.

22                  THE COURT: So 10/31 for the defense forensic report  
23 to the government.

24                  Now, I don't know, Mr. Spector may want to have case  
25 agents take a look at it or their own forensic analyst to take

1 a look at it.

2                   What would your estimate be of how much time you  
3 would need?

4                   MR. SPECTOR: Judge, it's a little difficult, in a  
5 vacuum, because I don't know what the report is going to say.

6                   THE COURT: Why don't we do this. Because it is  
7 difficult to assess the nature of the evidence that is  
8 involved here, what if the government provides the Court with  
9 a status report by November 19th?

10                  MR. SPECTOR: That's fine, Judge. Thank you.

11                  THE COURT: Okay. In the meantime, have the  
12 defendants been interviewed by probation? And all the rest of  
13 the probation report is about ready to go. I think it's just  
14 waiting for the financial information.

15                  MR. RADICK: My understanding is yes. In fact,  
16 they've met with and interviewed by probation. A probation  
17 officer has actually visited the schools.

18                  Did a probation officer visit your home?

19                  DEFENDANT FAN: Yes.

20                  MR. RADICK: So the probation officer has been doing  
21 a substantial amount on that score. I think it's the  
22 guidelines, loss issues that remain to be filled in.

23                  THE COURT: So why don't I get a status report from  
24 the government on November 19th. This way I'll have a more  
25 realistic idea of what to tell probation as far as the

1 disclosure of the presentence report is concerned. Then I  
2 will just issue a scheduling order directing the presentence  
3 report to be disclosed by a certain date.

4           Generally we don't issue the sentencing schedule  
5 order until the presentence report has actually been disclosed  
6 because it could be that maybe probation has questions and  
7 they want to look at something that might extend it. But at  
8 least we can give probation a date for the disclosure once we  
9 have the presentence report. Then we'll set a scheduling  
10 date.

11           If you look at my schedules, that will have -- I  
12 built in the requisite Rule 32 period for objections to the  
13 presentence report. I do like to receive -- all of the  
14 objections should be in writing to probation. And I like to  
15 get courtesy copies. I leave it up to the attorneys as to  
16 whether you want to post it on ECF. You don't have to. But I  
17 do like to get a courtesy copy so I know what is pertinent in  
18 the minds of the parties.

19           And also, any sentencing memoranda. Just in terms  
20 of the deadline for the sentencing memoranda, count back from  
21 the date of sentence. Don't include the date of sentence.  
22 Don't include Saturdays. Don't include holidays.

23           All of that is in my standard requirements in a  
24 federal case, which is on the official court website. If you  
25 can't access it or you have any questions about it, contact my

1 deputy.

2                   Of course, if there are any letters in support of  
3 Ms. Fan or Mr. Shen would like to have included in the  
4 sentencing memoranda, Ms. Fan and Mr. Shen, it's important to  
5 work with your attorney on that. Because he does not want to  
6 be in a position, coming to Court very red-faced on the date  
7 of sentence, saying I just got this pile of letters from my  
8 clients and their family members and friends and community  
9 people.

10                  So you need to work with him on that, and cooperate  
11 with him on that, if that's your intention to do that. You  
12 don't have to, but if that's something that you want to do.  
13 It's difficult for me to look at things piecemeal. I  
14 certainly don't want to be in a position to look at something  
15 the day of sentence. I would like to read it in advance and  
16 be able to consider everything.

17                  Is there anything else that the parties want to  
18 raise today?

19                  MR. SPECTOR: Not from the government, Your Honor.

20                  THE COURT: Obviously, if the schedule needs to be  
21 extended. We are happy to accommodate. And then we'll just  
22 take it from there. The status report, I think I told you  
23 November 19th. I want to make sure I don't make a mistake in  
24 the schedule again.

25                  MR. RADICK: Thank you very much, Your Honor.

U.S.A. v. FAN and SHEN

19

1           THE COURT: Again, my apologies. And thank you all  
2 very much for your patience.

3           MR. SPECTOR: Thank you, Judge.

4           MR. RADICK: Thank you, Judge.

5 (Matter concluded.)

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